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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1989

No. 89-7279

ROBERT LEE SHELL,

Petitioner,

v.

STATE OF MISSISSIPPI,

Respondent.

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

KENNETH J. ROSE
923 Carolina Avenue,
Durham, N.C. 27705.
(919) 286-7653

Counsel for Petitioner

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The Petitioner, ROBERT LEE SHELL, files the following Reply to Respondent's Brief in Opposition to his petition for a writ of certiorari to review the judgment of the Supreme Court of Mississippi affirming Petitioner's sentence to death by lethal gas.

REASONS FOR GRANTING THE WRIT

Petitioner respectfully suggests that Respondent errs in arguing that the Writ should not issue to consider tne following important constitutional questions:

I. WHETHER THERE IS ANY CONSTITUTIONAL LIMITATION ON THE INTRODUCTION OF GRUESOME, INFLAMMATORY PHOTOGRAPHS WHICH PURPORT TO SHOW THE VICTIM, WHEN THE JURY IS NOT TOLD THAT THERE HAS BEEN MUTILATION BY THE PATHOLOGIST DURING AUTOPSY?

Respondent makes various claims concerning this claim which vary from dubious to flatly inaccurate.

A. The issue was clearly presented to the Court below.

First, Respondent claims that the issue was not presented in federal constitutional terms in the Mississippi Supreme Court. In light of the pages of discussion in Mr. Shell's briefs to the court below on the issue of the unfairness of the introduction of gruesome photographs, it might be sufficient to state that this Court's "jurisdiction does not depend on citation to book and verse." Eddings v. Oklahoma, 455 U.S. 104, 113 n.9, 102 S. Ct. 869, 71 L. Ed. 2d 1 (1982); see also Picard v. Connor, 404 U.S. 270, 278, 92 S. Ct. 509, 30 L. Ed. 2d 438 (1971).

However, in point of fact Petitioner did cite the federal constitution by "chapter and verse." Respondent's contention that the issue was not presented to the lower court conveniently -- and unfairly -- ignores the explicit language raising the federal constitutional issues in Petitioner's brief to the court below.

Consider the following quotes from Mr. Shell's brief on direct appeal. Mr. Shell was careful to begin his brief by noting that, with respect to each issue presented, he was,

> . . . predicating each argument on all applicable aspects of the Fourth, Fifth, Sixth,

> Eighth and Fourteenth Amendments to the United States Constitution. . . .

Brief of Appellant, at 4 (emphasis supplied). This alone is more than sufficient to put paid to the argument that "nowhere did []he cite to the Federal Constitution. . . ." Webb v. Webb, 451 U.S. 493, 496, 101 S. Ct. 1889, 68 L. Ed. 2d 392 (1981).

When it came to arguing the issue of the gruesome photographs, Mr. Shell again cited federal constitutional law:

> Indeed, as the United States Supreme Court has repeatedly held, "[b]ecause of the qualitative difference [between death and any other form of punishment], there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case." Woodson v. North Carolina, 428 U.S. 280, 305, 96 S. Ct. 2978, 49 L. Ed. 2d 944 (1976); accord Gardner v. Florida, 430 U.S. 349, 357-58, 97 S. Ct. 1197, 51 L. Ed. 2d 393 (1977); Lockett v. Ohio, 438 U.S. 586, 604, 98 S. Ct. 2954, 57 L. Ed. 2d 973 (1978); Beck v. Alabama, 447 U.S. 625, 637-38, 100 S. Ct. 2382, 65 L. Ed. 2d 392 (1980); Eddings v. Oklahoma, 455 U.S. 104, 118, 102 S. Ct. 869, 71 L. Ed. 2d 1 (1982) (O'Connor, J., concurring).

Brief of Appellant, at 16. The same argument was reiterated in Mr. Shell's second brief. *See Appellant's Reply Brief, at 9.* Again, Respondent cannot honestly mean to now tell this Court that Petitioner never "cite[d] . . . to any cases relying on the . . . Federal Constitution." Webb v. Webb, 451 U.S. at 496.

Next, Mr. Shell argued that "in light of the greater protections required by the state and federal constitutions at the penalty phase, the trial court's finding that lesser protections

should apply is paradoxical at best." *Brief of Appellant, at 16 (emphasis supplied in part).*[1]

Again, on his Petition for Rehearing, Mr. Shell alleged that his rights had been violated, relying on "the Sixth, Eighth and Fourteenth Amendments to the Federal Constitution." *Petition for Rehearing, at 1.* The only issue presented in the Petition was the challenge to the admission of the gruesome photographs.[2]

Under any standard, then, it is clear that the issue is properly presented to this Court for review.

B. **Respondent also misrepresents the facts.**

Respondent next complains that an "inaccura[te argument] presented by petitioner is that there was no explanatory testimony for the photographs." *Brief in Opposition, at 11.*[3] Petitioner

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1. Petitioner also argued that such inflammatory evidence would rise to a "denial of due process. . . ." *Id. at 19; see also Appellant's Reply Brief, at 14* ("Mr. Shell was 'denied a fair trial'").

2. This alone would have been sufficient to preserve the issue. As this Court explicitly held in Hathorn v. Lavorn, 457 U.S. 255, 263, 102 S. Ct. 2421, 72 L. Ed. 2d 824 (1982), the Mississippi Supreme Court reaches the merits of issues raised for the first time on petition for rehearing. In any event, when all the argument is completed, it is clear that the Court did not just consider some evidentiary ruling as an alleged violation of a state rule. Quoting from Mr. Shell's brief, the State Supreme Court posed the question as whether the admission of gruesome photographs "deprive[d] Shell of his rights under the constitution and the rules of evidence?" Shell v. State, 554 So. 2d 887, 902 (Miss. 1989) (emphasis supplied).

3. The other alleged "inaccuracy" concerns the "mutilation" of the victim's body in one of the pictures. Without quibbling over the meaning of the word "mutilation", Petitioner merely invites this Court to look at the color picture in question, which is included in his brief to the lower court. *See Brief of Appellant, at 17.*

begs to differ, albeit without casting similar aspersions concerning the "accuracy" of Respondent's representations to this Court.

This Court will search the record in vain for a single reference to the pictures in question made by any witness before the jury.[4] The pictures were simply "introduced" by the prosecuting attorney, over vehement objection.

The question is not -- as argued by Respondent -- whether one of the pictures accurately represented the victim in the preparatory stages of the autopsy. To be sure, the "bloody" shorts in Miller v. Pate, 386 U.S. 1, 87 S. Ct. 785, 17 L. Ed. 2d 690 (1967), had come from the crime scene. The fundamental due process violation in Miller v. Pate was that the jury was arguably misled into believing that what was actually red paint was really blood.

Similarly, in this case nobody ever told the jury that the head of the victim had been shaved in preparation for autopsy. Indeed, nobody ever told the jury anything about what the pictures were meant to represent. Surely it would not be permissible to introduce pictures of dead bodies totally unrelated to the crime charged? To introduce altered pictures without explanation poses similar constitutional problems.

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4. Petitioner concurs with Respondent's footnote concession that "[t]he in limine argument concerning the admissibility of these pictures during the guilt phase is immaterial to the question of the use of the pictures during the sentencing phase." *Brief in Opposition, at 11 n.2.* While evidence was introduced before the trial judge in support of the State's motion to admit the pictures, the jury never heard any of it.

C. The issue presented has caused a conflict in the lower courts, and should be addressed by this Court.

Respondent makes much of the fact that this case is distinguishable from Thompson v. Oklahoma, 487 U.S. ___, 108 S. Ct. ___, 101 L. Ed. 2d 702 (1988), where this Court granted certiorari on a very similar issue, but failed to resolve it. Respondent is correct to point out that in Thompson the pictures were introduced at the guilt phase, with evidence to explain what they were intended to depict. Arguing that there was no constitutional violation, Justice Scalia would have held that the pictures "were certainly probative of the aggravating circumstance that the crime was 'especially heinous, atrocious or cruel.'" Id., 101 L. Ed. 2d at 748 (Scalia, J., dissenting). Therefore the only question was "whether they were unduly inflammatory." Id.

In this case, since there was no evidence to explain what the pictures were meant to show, the prejudice was much greater. To the extent that Thompson may properly be distinguished from this case, then, the due process and Eighth Amendment challenges made here are far more compelling.

For the reasons set forth in Mr. Shell's original petition, therefore, this Court should grant certiorari to resolve the conflicting decisions in the lower courts.

II. WHETHER THIS CASE SHOULD BE REMANDED IN LIGHT OF McKOY v. NORTH CAROLINA?

Respondent argues that the case should not be remanded for further consideration in light of McKoy v. North Carolina, 494 U.S. ___, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990). The thrust of Respondent's argument is that McKoy and Mills v. Maryland, 486 U.S. 367, 108 S. Ct. 1860, 100 L. Ed. 2d 384 (1988), only apply to cases where the jury is explicitly told that mitigating evidence had to be ignored unless the jury found an applicable mitigating circumstance unanimously. *See Brief in Opposition, at 14-16.*

This may have been the narrower ground upon which Justice Kennedy chose to decide the case. See McKoy v. North Carolina, 108 L. Ed. 2d at 386-89 (Kennedy, J., concurring). However, it was not the rule set forth by the five justices who joined the majority opinion.

Indeed, this much is clear from the cases which have been remanded for reconsideration in light of McKoy. For example, while Huff v. North Carolina, No. 89-6260, ___ U.S. ___, 47 Cr. L. Rptr. 3088 (July 28, 1990), was remanded for further consideration in light of McKoy because the specific unanimity instruction was given, in McNeil v. North Carolina, 494 U.S. ___, 110 S. Ct. ___, 108 L. Ed. 2d 756 (1990), this Court vacated for further consideration in light of McKoy where no such instruction was given. Four justices dissented because the jury was not explicitly told that the verdict had to be unanimous. Id. at 756-57. The major-

ity, however, concluded that there was a reasonable probability that the jury might have believed that they had to be unanimous.

The same is true here. Indeed, the instructions in McNeil are indistinguishable from those given in this case. *See Exhibit A, at 461-66.* Considerations of comity require that the Mississippi Supreme Court be given the first crack at applying McKoy to this case. Similarly, considerations of judicial economy mandate that the issue should be reconsidered by the Mississippi Supreme Court expeditiously. A remand is just and appropriate. See also Petary v. Missouri, 494 U.S. ___, 110 S. Ct. ___, 108 L. Ed. 2d 931 (1990) (remanding for reconsideration in light of McKoy).

III. WHETHER THIS CASE SHOULD BE REMANDED IN LIGHT OF CLEMONS v. MISSISSIPPI?

Likewise, Respondent challenges the application of Clemons v. Mississippi, 494 U.S. ___, 110 S. Ct. ___, 108 L. Ed. 2d 725 (1990), to this case. In Clemons this Court recently provided guidance on the application of Maynard v. Cartwright, 486 U.S. ___, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988), and Godfrey v. Georgia, 446 U.S. 420, 100 S. Ct. 1759, 100 L. Ed. 2d 398 (1980), to the Mississippi scheme. This Court held that, where a jury is told to weigh an invalid aggravating circumstance in the life-or-death decision, an appellate court cannot simply rubber-stamp the error where one other valid circumstance is present.

According to Respondent's tortured reading of Clemons, no case should be remanded unless the lower court explicitly held that the "especially heinous, atrocious or cruel" circumstance had been

explicitly held unconstitutional, leaving only the question of the improper inclusion of an invalid circumstance to decide.

It must be said that the jury was read an instruction requested by the State which purported to define the circumstance. See Shell v. State, 554 So. 2d at 903. This was the basis upon which the lower court upheld Mr. Shell's death sentence. Indeed, Respondent argues that this case should be "distinguished" from Maynard v. Cartwright "because in Maynard there was no accompanying instruction defining the terms of the aggravating circumstance." *Brief in Opposition, at 17.*

Respondent seems to have simply failed to read this Court's decision. Precisely the same "limiting" instruction was given by the Oklahoma court. See Cartwright v. Maynard, 822 F.2d 1477, 1488 (10th Cir. 1987) (en banc), aff'd sub nom. Maynard v. Cartwright, supra. The Tenth Circuit, and later this Court, rejected the notion that this instruction really lent any guidance at all to the jury. To the extent that the Mississippi Supreme Court was able to "distinguish" Maynard, the court misapplied the law.

The only basis upon which the Mississippi Supreme Court opinion therefore rests is that "the remaining circumstance would be sufficient to uphold the death sentence." *Brief in Opposition, at 18* (citing Clemons v. State, 535 So. 2d 1354 (Miss. 1989), rev'd sub nom. Clemons v. Mississippi, supra). As with other cases,[5] this Court should therefore vacate the death sentence, and allow

5. See, e.g., Pinkney v. Mississippi, 494 U.S. ___, 110 S. Ct. ___, 108 L. Ed. 2d 931 (1990); Stringer v. Black, 494 U.S. ___, 110 S. Ct. ___, 108 L. Ed. 2d 931 (1990).

the Mississippi Supreme Court the opportunity to address this issue in light of Clemons.

CONCLUSION

WHEREFORE, Petitioner respectfully requests that this Court grant his Petition for a Writ of Certiorari to review the decision of the Supreme Court of Mississippi.

Respectfully submitted,

Kenneth Rose

KENNETH J. ROSE M. Cass
923 Carolina Avenue,
Durham, N.C. 27705.
(919) 286-7653.

Counsel for Petitioner,
Robert L. Shell

Certificate of Service

I do hereby certify that I have this day served a true and correct copy of the foregoing document by first class mail upon Marvin L. White, Jr., Assistant Attorney General, P.O. Box 220, Jackson, Ms. 39205-0220.

This the 9th day of August, 1990.

Kenneth Rose
M. Cass

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APPENDIX A

Excerpts from record on appeal in McNeil v. North Carolina, 494 U.S. ___, 110 S. Ct. ____, 108 L. Ed. 2d 756 (1990)

COURT: Members of the jury, having found the defendant Leroy McNeil guilty of first degree murder of Elizabeth Stallings and Deborah Fore, it is now your duty to recommend to the Court whether the defendant should be sentenced to death or to life imprisonment in each of these cases. Your recommendation will be binding upon this Court. If you unanimously recommend that this defendant be sentenced to death in either case, this Court will be required to impose a sentence of death in that case. If you unanimously recommend a sentence of life imprisonment in either case, and you must consider each case separately, the Court will be required to impose a sentence of life imprisonment in the State's prison.

Now all of the evidence relevant to your recommendation has been presented. There is no requirement to resubmit during the sentencing procedure any evidence that was submitted during the guilt phase of this case. All of the evidence wnich you heard in both phases of the case is competent for your consideration in recommending punishment.

It is now your duty to decide from all of the evidence presented in both phases what the facts are. You must then apply the law which I am about to give you concerning punishment to those facts. It is absolutely necessary that you understand and apply the law as I give it to you, and not as you think it is, or might like it to be.

This is important, because justice requires everyone who is sentenced for first degree murder have the sentence recommendation determined in the same manner, and have the same law applied to him.

You, ladies and gentlemen, as the triers of fact, are again the sole judges of the credibility of each witness. You must decide for yourselves whether to believe the testimony of any witness. You may believe all, or any part, or none of what a witness has said on the stand.

In determining whether to believe any witness, you should apply those same tests of truthfulness which you apply in your everyday affairs in making your most important business decisions. As applied to this trial, these tests may include, among others, the following: The opportunity of a witness to see, hear, know or remember the facts or occurrences about which he or she has testified; the manner and appearance of a witness; any interest, bias or prejudice the witness may have; the apparent understanding and fairness of the witness, whether the witness' testimony is reasonable and whether the witness' testimony is consistent with other believable evidence in the case.

You are again the sole judge of the weight to be given any evidence. By this I mean, if you decide that certain evidence is believable you must then determine the importance of that evidence in light of all other believable

evidence in the case.

Now at this time, ladies and gentlemen, I shall very briefly summarize what some of the evidence presented by the State and some of the evidence presented by the defendant tends to show as to these two cases. In the case of the State of North Carolina versus Leroy McNeil, involving the first murder of Elizabeth Stallings, the State has offered evidence tending to show that on or about the 8th day of April, 1983,the defendant Leroy McNeil and his wife picked up the deceased, Elizabeth Faye Stallings, and they picked up Ms. Stallings with the inducement that they would go somewhere to party, to engage in activities together. That initially this was presented to Ms. Stallings as a very friendly kind of meeting. The defendant and Penny McNeil took Elizabeth Stallings to an abandoned house next to their house on the pretense of securing some controlled substances from that house. That through this ruse they were eventually able to get Elizabeth Stallings into the house and that at that time, consistent with the prearranged plan to do so, they proceeded to effectuate a robbery of the food stamps which Elizabeth Stallings had in her possession. Leroy McNeil took the food stamps from her; he beat her; he stabbed her; took her clothes off and that after securing a rifle, he shot her in the head and killed her. Now this was some of the evidence offered by the State as to that

case tends to show.

The State additionally, as to that case and to the case involving the murder of Deborah Fore, at the sentencing hearing offered evidence tending to show that on the 18th day of May, 1977, Leroy McNeil entered a plea of guilty and was therefore convicted of the voluntary manslaughter of Cynthia Latham McNeil.

As to the case of State of North Carolina versus Leroy McNeil, involving the first degree murder of Deborah Fore, the State offered evidence tending to show that on or about the 10th day of April of 1983, the defendant Leroy McNeil discussed with his wife the fact that they needed money. That pursuant to that, he called Deborah Fore, an individual that he thought might have some money, on the pretense of taking her out on a date. Eventually, the defendant and Penny McNeil went to Deborah Fore's house. She got in the car with them, needing a ride to the store. That they drove around, finally driving to a secluded area of Wake County. At that time the defendant indicated that a tire on his car was going flat, as one actually was. He went back to the back of his car, opened the trunk. Prior to doing so, he had taken a pistol out from under the seat and armed himself with it. Eventually Deborah Fore got out of the car and came back to where the defendant was to see what the problem was with the tire. The defendant thereafter shot

Deborah Fore in the head with the pistol, causing her death. After the defendant shot Deborah Fore, he removed from her person a small amount of U.S. currency, her keys and other items of personal property.

The defendant, as to each of these cases, has offered evidence tending to show that the defendant had been drinking heavily prior to the incident involving Elizabeth Stallings and prior to the incident involving Deborah Fore. The defendant was, in fact, an alcoholic, a habitual drinker and that his drinking impaired his judgment and his inhibitions and impaired his capacity to recognize the criminality of either of the acts.

The defendant further offered evidence tending to show that the defendant is an individual with a relatively low IQ; in fact, is borderline mentally retarded. That after his arrest and at his specific request he met with law enforcement officers and made a full and complete statement concerning all of these incidents.

Further, the defendant offered evidence tending to show that the defendant had been employed with a construction company here in Wake County and that he worked hard at that job. That even though he had some absentee problems related to his drinking, that he was a hard-working employee of that construction company.

This is what some of the evidence offered by the

defendant as to each of these cases and in this sentencing hearing tends to show. Both as to the evidence offered by the State and the evidence offered by the defendant, I have summarized the evidence only very briefly. You should consider all of the evidence and if your recollection differs from mine, rely upon your own.

Additionally, I have only related what the evidence for the State and the evidence for the defendants tends to show, not what it does show, because, you, ladies and gentlemen, are the finders of the fact and, therefore, only you determine what the evidence does show.

So I charge that for you to recommend that this defendant be sentenced to death in either, in either the Stallings case or the Fore case, the State must prove three things from the evidence beyond a reasonable doubt. Now a reasonable doubt is a doubt based on reason and common sense, arising out of some or all of the evidence that has been presented, or lack or insufficiency of the evidence, as the case may be. Proof beyond a reasonable doubt is proof that fully satisfies or entirely convinces you of each of the following things:

First, that one or more aggravating circumstances exist.

Two, that any mitigating circumstances you have found are insufficient to outweigh any aggravating

circumstances you have found.

Third, that any aggravating circumstances you have found are sufficiently substantial to call for the imposition of the death penalty when considered with any mitigating circumstances that you have found.

Again, it will be your responsibility to consider the aggravating and the mitigating circumstances separately as to each case and to make a separate decision as to each case. If in either case or in both you unanimously find all three of these things beyond a reasonable doubt, it would be your duty to recommend that this defendant, Leroy McNeil, be sentenced to death. If you do not so find or if you have a reasonable doubt as to one or more of these things, in either case, then it would be your duty to recommend that the defendant be sentenced to life imprisonment in that case.

When you retire to deliberate your recommendations as to punishment, you will take with you two forms, one for each case, entitled "Issues and Recommendations as to Punishment." This form contains a written list of four issues relating to aggravating and mitigating circumstances. I will now take up these four issues in each case with you in greater detail, one by one, to enable you to follow me more easily. The bailiff will now give each of you a copy of two forms, each entitled "Issues and Recommendations as

to Punishment." One form relates to the Deborah Fore case and that is indicated in the caption at the top of that form. The other form relates to the Elizabeth Stallings case and that is indicated in the caption at the top of that form. Mr. Sheriff, will you distribute one copy of these to each juror. Ladies and gentlemen, please do not read ahead in the form, simply follow them with me as I go through them.

Issue: Number One in the case involving the first degree murder of Elizabeth Faye Stallings reads as follows:

Do you unanimously find from the evidence, beyond a reasonable doubt, the existence of one or more of the following aggravating circumstances in the case, in the murder involving Elizabeth Stallings?

In the case involving first degree murder of Deborah Fore would read as follows:

Do you unanimously find from the evidence, beyond a reasonable doubt, the existence of one or more of the following aggravating circumstances?

In the case involving the first degree murder of Elizabeth Faye Stallings, three possible aggravating circumstances are listed on the form and you should consider each of them before you answer Issue Number One. Two possible aggravating circumstances are listed on the form in the case involving Deborah Fore and you should consider each of them before you answer Issue Number One.

Now the State must prove from the evidence beyond a reasonable doubt the existence of any aggravating circumstance, and, before you may find any aggravating circumstance you must agree unanimously that it has been so proven. An aggravating circumstance is a group of facts which tend to make a specific murder particularly deserving of the maximum punishment prescribed by law, that being death. Our law identifies the aggravating circumstances which might justify a sentence of death. Only those circumstances identified by statute may be considered by you as an aggravating, as aggravating circumstances. Under the evidence in the case involving the first degree murder of Elizabeth Stallings, three possible aggravating circumstances may be considered. Under the evidence in the case involving the first degree murder of Deborah Fore, two possible aggravating circumstances may be considered. The following are the aggravating circumstances which may be applied to these cases.

First, the first aggravating circumstance, if it applies at all, would under the evidence in this case apply in both cases. It reads as follows:

First, has Leroy McNeil been previously convicted of a felony involving the use of violence to the person?

[Now voluntary manslaughter is by definition a felony involving the use of violence to the person.] Voluntary manslaughter

is defined as the intentional and unlawful killing of a human being without malice, without premeditation and without deliberation.

A person has been previously convicted, if he has been convicted and not merely charged and if his conviction is based upon conduct which occurred before the events out of which these murders arose.

So if you find from the evidence beyond a reasonable doubt that on or about the 18th day of May, 1977, in Mecklenburg County, Leroy McNeil had been convicted of voluntary manslaughter of Cynthia Latham McNeil and that he, Leroy McNeil, killed Elizabeth Stallings and Deborah Fore after he committed this voluntary manslaughter, then you would find this aggravating circumstance and would so indicate by having your foreperson write "Yes" in the space after this aggravating circumstance on the Issues and Recmendation Form of the Stallings case and the Fore case as appropriate.

If you do not so find or have a reasonable doubt as to one or more of these things, then you will not find this aggravating circumstance and will so indicate by having your foreperson write "No" in that space in the Stallings case and in the Fore case as appropriate.

Second, was the murder, was this murder of Elizabeth Faye Stallings committed by Leroy McNeil while Leroy

McNeil was engaged in the commission of robbery with a firearm?

Additionally, second, was this murder committed by Leroy McNeil while Leroy McNeil was engaged in the commission of robbery with a firearm as related to the murder of Deborah Fore?

As to this potential aggravating circumstance, you should consider the evidence separately in each of the two cases and you should focus separately on this issue in each of the two cases and your answer would be based upon your evaluation of the evidence as it relates to each of the two cases separately.

Robbery with a firearm is the taking and carrying away of any personal property of another from her person or in her presence without her consent by endangering or threatening a person with a firearm, with the intent to deprive her of the use of property permanently, the taker knowing that he was not entitled to take that property.

If you find from the evidence beyond a reasonable doubt that Leroy McNeil killed Elizabeth Stallings--excuse me, that when Leroy McNeil killed Elizabeth Stallings, Leroy McNeil was taking and carrying away a quantity of food stamps from the person and presence of Elizabeth Stallings without her voluntary consent, by endangering or threatening Elizabeth Stallings with a firearm, Leroy McNeil knowing that he was

not entitled to take these food stamps and intending at that time to deprive Elizabeth Stallings of their use permanently, then you would find this aggravating circumstance in the Elizabeth Stallings case. You would so indicate by having your foreperson write "Yes" in the space after this aggravating circumstance on the Issues and Recommendations Form of the Elizabeth Stallings case.] [.....86

If you do not so find or have a reasonable doubt as to one or more of these things, then you will not find this aggravating circumstance and will so indicate by having your foreperson write "No" in that space.

[Turning now to the case involving the first degree murder of Deborah Fore. If you find from the evidence beyond a reasonable doubt when Leroy McNeil killed Deborah Fore, Leroy McNeil was taking and carrying away U.S. currency, keys and other items of personal property from the person and presence of Deborah Fore without her consent, by endangering or threatening Deborah Fore with a firearm, specifically a pistol, Leroy McNeil knowing that he was not entitled to take this personal property and intending at that time to deprive Deborah Fore of the use of the property permanently, then you will find this aggravating circumstance and would so indicate by having your foreperson write "Yes" in the space provided after this aggravating circumstance on Issues and Recommendations Form in the

Deborah Fore case.] Exception No. 87

If you do not so find or have a reasonable doubt as to one or more of these things, then you will not find this aggravating circumstance and will so indicate by having your foreperson write "No" in that space in the Deborah Fore case.

Only in the Elizabeth Stallings case there is a third aggravating circumstance, third potential aggravating circumstance for your consideration. It reads as follows:

[Three, was the murder of Elizabeth Stallings especially heinous, atrocious or cruel?

Again this aggravating circumstance may not be considered in the Deborah Fore case.

Okay. In this context heinous means extremely wicked or shockingly evil; atrocious means outrageously wicked and vile; and cruel means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others. However, it is not enough that this murder of Elizabeth Stallings be heinous, atrocious or cruel as those terms have just been defined. This murder must have been especially heinous, atrocious or cruel, and not every murder is especially so. For this murder to have been especially heinous, atrocious or cruel, any brutality which was involved in it must have exceeded that which is normally present in any killing. This murder

must have been a murder without conscience or pitiless crime which was unnecessarily tortuous to the victim, Elizabeth Stallings. If you find from the evidence beyond a reasonable doubt that this murder of Elizabeth Stallings was especially heinous, atrocious or cruel, you would find this aggravating circumstance in that case and would so indicate by having your foreperson write "Yes" in the space after this aggravating circumstance on the Issues and Recommendations Form of Elizabeth Stallings.] Exception No. 88

If you do not so find or have a reasonable doubt as to one or more of these things, then you will not find this aggravating circumstance in the Elizabeth Stallings case and will so indicate by having your foreperson write "No" in that space.

Now if you unanimously find from the evidence, beyond a reasonable doubt, one or more, that one or more of these aggravating circumstances existed in a particular case and have indicated by writing "Yes" in the space after one or more of them on the Issues and Recommendations Form of that particular case, then you would answer Issue One "Yes" in that case.

If you do not unanimously find from the evidence, beyond a reasonable doubt, that at least one of these aggravating circumstances existed and if you have so indicated by writing "No" in the space after every one of the

potential aggravating circumstances for that particular case, then you would answer Issue One "No" in that case.

If you answer Issue One "No" in a particular case, you would skip Issues Two, Three and you must recommend that this defendant be sentenced to life imprisonment.

If you answer Issue One "Yes" in a particular case then you would consider Issue Two.

Issue Two reads as follows:

Do you find from the evidence the existence of one or more of the following mitigating circumstances?

Now in each of the two cases six possible mitigating circumstances are listed on the form. You should consider each of them before answering Issue Two in each case.

A mitigating circumstance is a fact or group of facts which do not constitute a justification or excuse for a killing, or reduce it to a lesser degree of crime than first degree murder, but which may be considered as extenuating or reducing the moral culpability of the killing or making it less deserving of extreme punishment than other first degree murders. Our law identifies several possible mitigating circumstances. However, in considering Issue Two, it would be your duty to consider as a mitigating circumstance any aspect of the defendant's character or record and any of the circumstances of a particular murder that the

defendant contends is a basis for a sentence less than death, and any other circumstances arising from the evidence that you deem to have mitigating value.

The defendant has the burden of proving to you that a given mitigating circumstance exists. The existence of any mitigating circumstance must be established by a preponderance of the evidence, that is, the evidence taken as a whole must satisfy you, not beyond a reasonable doubt, but simply satisfy you that any mitigating circumstance exists. If the evidence satisfies you that a mitigating circumstance exists, you would find that circumstance; if not, you would not find it. In either event, you would move on to consider the other mitigating circumstances and continue in like manner until you have considered all of the mitigating circumstances listed on the form and any others which you deem to have mitigating value.

Now it is your duty to consider the following mitigating circumstances and any others which you find from the evidence.

First--and this would apply, if at all, in each case. First, consider whether Leroy McNeil has no significant history of prior criminal activity. Significant means important or notable. Whether any history of prior criminal activity is significant is for you to determine from all of the facts and circumstances which you find from the evidence.

However, you should not determine whether it is significant only on the basis of the number of convictions, if any, in the defendant's record. Yet you should consider the nature and quality of the defendant's history, if any, in determining whether it is significant. You would find this mitigating circumstance if you find that the defendant Leroy McNeil has only been convicted of voluntary manslaughter and that this is not a significant history of prior criminal activity.

Now the second possible mitigating circumstance, and you will have to, as to this mitigating circumstance, focus on the evidence as related to each of the two cases and such of the evidence that might relate to both of the cases, but you should consider this potential mitigating circumstance separately in each of the two cases. This potential mitigating circumstance reads as follows:

Consider whether the capacity of Leroy McNeil to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired.

A person's capacity to appreciate the criminality of his conduct or to conform his conduct to the law is not the same as his ability to know right from wrong generally, or to know that what he is doing at a given time is killing or that such killing is wrong. A person may indeed know that a killing is wrong and still not appreciate its

wrongfulness because he does not fully comprehend or is not fully sensible to what he is doing or how wrong it is. Further, for this mitigating circumstance to exist, the defendant's capacity to appreciate does not need to have been totally obliterated. It is enough that it was lessened or diminished. Finally, this mitigating circumstance would exist, even if the defendant did appreciate the criminality of his conduct, if his capacity to conform to the law was impaired, since a person may appreciate that his killing is wrong and still lack the capacity to refrain from doing it. Again, the defendant need not wholly lack all capacity to conform. It is enough that such capacity as he might otherwise have had in the absence of voluntary intoxication is lessened or diminished because of such voluntary intoxication.

You would find this mitigating circumstance in the case involving the first degree murder of Elizabeth Stallings if you find that Leroy McNeil had drunk a large quantity of intoxicating liquor prior to the killing of Elizabeth Stallings and that this impaired his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law.

You would find this mitigating circumstance in the case involving the first degree murder of Deborah Fore if you find that Leroy McNeil had drunk a large quantity of

intoxicating liquor prior to the killing of Deborah Fore and that this impaired his capacity to appreciate the criminality of his conduct or to conform his conduct to the law.

Now the third possible mitigating factor or circumstance which you should consider is this:

That Leroy McNeil confessed to the crime and did so shortly after the crimes were committed.

Now this would apply, if at all, equally in both cases. If you find from the evidence that the defendant confessed to these crimes and did so shortly after the crimes were committed and that this has mitigating value, then you would find this mitigating circumstance.

Fourth, the defendant Leroy McNeil has an IQ of 78 and is borderline mentally retarded.

This mitigating circumstance would apply, if at all, in both cases. If you find from the evidence, based upon the preponderance of the evidence, that the defendant has an IQ of 78 or a low IQ and is borderline mentally retarded and if you find that this has mitigating value, then you would find this mitigating circumstance.

Fifth, the defendant Leroy McNeil had been a good and useful employee for Rea Construction Company prior to the events of April, 1983.

This would apply, if at all, to both of the cases.

If you find from the evidence and by the preponderance of the evidence that Leroy McNeil had been a good and useful employee for Rea Construction Company prior to April, 1983, and if you find that this has mitigating value, then you would find this mitigating circumstance.

Six, finally, you may consider any other circumstance or circumstances arising from the evidence which you deem to have mitigating value, including any aspect of the defendant's character or reputation or record, or any of the circumstances of this murder which you deem to have mitigating value.

If in a particular case you find one or more mitigating circumstances, then you would answer Issue Two "Yes" for that case. If you do not find at least one mitigating circumstance from the evidence, then you would answer Issue Two "No" in that case. Again, you are to consider each of the cases separately. If you answer Issue Two "Yes," then you must consider Issue Three for that case. If you answer Issue Two "No," in one or both of the cases, then as to the case you answer Issue Three "No"--excuse me, as to the case that you answer Issue Two "No," you would skip Issue Three and answer Issue Four.

Issue Three reads:

Do you unanimously find beyond a reasonable doubt that the mitigating circumstance or circumstances found by

you is, or are, insufficient to outweigh the aggravating circumstance or circumstances found by you?

You will consider this issue separately in each case. You will consider it separately in the Elizabeth Stallings case and in the Deborah Fore case. If you find from the evidence one or more mitigating circumstances in one or the other, or both cases, you must weigh the aggravating circumstances found by you in that particular case against the mitigating circumstances found by you in that particular case. In doing so, you are the sole judges of the weight to be given to any individual circumstance which you find, whether aggravating or mitigating. You should not merely add up the number of aggravating circumstances and mitigating circumstances. Rather, you must decide from all the evidence what value to give to each circumstance. Then you must weigh the aggravating circumstances of that particular case, so valued, against the mitigating circumstances of that particular case, so valued, and determine whether the mitigating circumstances outweigh the aggravating circumstances.

In each case if you unanimously find beyond a reasonable doubt the mitigating circumstances found by you in that particular case are insufficient to outweigh the aggravating circumstances found by you in that particular case, you would answer Issue Three "Yes" in that case. If

you do not so find or have a reasonable doubt as to whether they do, you would answer Issue Three "No" in that case. If you answer Issue Three "No" in any case, in either of the two cases, as to that case, it would be your duty to recommend that the defendant be sentenced to life imprisonment. If you answer Issue Three "Yes" in a particular case, then it would be your responsibility to consider Issue Four in that particular case.

Issue Four reads as follows:

Do you unanimously find beyond a reasonable doubt that the aggravating circumstance or circumstances found by you is, or are, sufficiently substantial to call for the imposition of the death penalty when considered with the mitigating circumstance or circumstances found by you?

If you reach Issue Four in either or both cases, you should consider it separately as to the Stallings case and as to the Fore case. In deciding this issue, you are not to consider the aggravating circumstances standing alone. You must consider them in connection with any mitigating circumstances found by you in a particular case. After considering the totality of the aggravating and mitigating circumstances, you must be convinced beyond a reasonable doubt that the imposition of the death penalty is justified and appropriate in that case before you can answer the issue "Yes." In doing so, you are not applying a

mathematical formula. For example, three circumstances of one kind do not automatically and of necessity outweigh one circumstance of another kind. The number of circumstances found is only one consideration in determining which circumstances outweigh others. You may very properly emphasize one circumstance more than another in a particular case. You must consider the relative substantiality and persuasiveness of the existing aggravating and mitigating circumstances in making this determination. You, the jury, must determine how compelling and persuasive the totality of the aggravating circumstances are when compared with the totality of the mitigating circumstances found by you. After so doing, if you are satisfied beyond a reasonable doubt that the aggravating circumstances found by you are sufficiently substantial to call for the death penalty, then it would be your duty to answer that issue "Yes" in that particular case. If you are not so satisfied or have a reasonable doubt, then it would be your duty to answer the issue "No" in that particular case.

In the event that you do not find existence of any mitigating circumstances, you must still answer this issue. In such case, you must determine whether the aggravating circumstances found by you are of such value, weight, importance, consequence, or significance as to be sufficiently substantial to call for the imposition of the death

penalty. Substantial circumstances may be contras.ed with circumstances that are enuous, flimsy, abstract, imaginary, deceptive, or negligible.

Substantial means having substance or weight, important, significant or momentous. Aggravating circumstances may exist in a particular case and still not be sufficie..tly substantial to call for the death penalty. Therefore, it is not enough for the State to prove from the evidence beyond a reasonable doubt the existence of one or more aggravating circumstances. It must also prove beyond a reasonable doubt that such aggravating circumstances are sufficiently substantial to call for the death penalty, and before you may answer Issue Four "Yes" in either case, you must agree unanimously that they are.

If you answer Issue Four "No" in a particular case, you must recommend that this defendant be sentenced to life imprisonment. If you answer Issue Four "Yes" in a particular case, it would be your duty to recommend that the defendant be sentenced to death in that particular case.

Now ladies and gentlemen, I've got just a little bit more instructions, only about a minute or two, but--and I think there will be time for you to deliberate, at least briefly this afternoon. I'm going to take a recess now until 4:30, at which time I will complete the instructions and let you begin your deliberations.

RECESS.

COURT: Members of the jury, you have heard the evidence and the arguments of counsel for the State and for the defendant. I have not summarized all of the evidence, but it is your duty to recall and to consider all the evidence, whether it's been called to your attention or not. If your recollection of the evidence differs from mine, from the prosecutor, the defense attorney, you are to rely solely upon your recollection of the evidence in your consideration. I have not reviewed all the contentions of the State or of the defendant, but it is your duty to consider not only all the evidence, but also to consider all the arguments, contentions and positions urged by the State's attorneys and by the defendant's attorneys in their final speeches to you, and any other contention that arises from the evidence, whether it's called to your attention or not, and to weigh all this in the light of your common sense, and to make your recommendation as to punishment.

The law, as certainly it should, requires the Presiding Judge to be completely and totally impartial. You are not to draw any inference from any ruling that I have made, or any inflection in my voice or expression on my face, or anything else that I have said or done during this trial, that I either have an opinion or have intimated an opinion as to whether any part of the evidence should be

believed or disbelieved, as to whether any of the aggravating or mitigating circumstances has been proved or disproved, or as to what your recommendation in either case ought to be. It is your exclusive providence to find the true facts of these cases and to make your recommendation reflecting the truth as you find it to be.

Now ladies and gentlemen, when you retire you should select a foreperson. You may select the same foreperson that you selected in the guilt phase; however, you are not obliged to do so. Your decision, your answers to any of the issues as to your final recommendation must be unanimous, all twelve of you agree.

Now when you retire, I'm going to ask that you pass up your copies of the issue sheets to the bailiff. When you first retire please do not begin your deliberations, simply select your foreperson. When you receive the issues and recommendation as to punishment forms in the two cases, then you may begin your deliberations. When you have answered the forms consistent with the instructions that I have given you and when you have made a recommendation based upon your answers to the issues, your foreperson has answered either all the issues or such answers that are appropriate based upon my instructions in giving your answers to the issues, your foreperson has filled in, dated and signed the recommendation as to punishment in each case,

then you will have completed your deliberations.

Now again, if you have questions during the deliberative process, the procedure is for all of you to return to the courtroom and your foreperson ask the question on behalf of the jury.

At this time I'm in a position to excuse the two alternate jurors with my very great thanks for your service in this case. At this time the two alternate jurors are excused. This would complete your jury service. I do not believe that the jury clerk is here this afternoon, so it will not be necessary for you to check out with her, but this will complete your jury service and I thank each of you very much. Thank you.

Okay. Ladies and gentlemen, at this time you may retire and when you receive the issue sheet begin your deliberations. Please give your copies of the issue sheets to the bailiff as you retire to the jury room.

JURY RETIRES. (4:26 P.M.)

COURT: At this proceeding outside the presence of the jury, the Court inquires of the State, if the State has any request for additional instructions or any objections to the instructions.

MR. STEPHENS: The State has no request for additional instructions. The State has no objections to the jury instructions.

COURT: The Court inquires of the defendant, if it has requests for additional instructions.

MR. GAMMON: No, Your Honor.

COURT: In light of that, I'm going to give the Recommendations for Punishment Form to the bailiff and ask him to give it to the jury for them to begin their deliberations.

JURY RETURNS. (5:02 P.M.)

COURT: Ladies and gentlemen, having gone over the appointed time yesterday, I think we'll stop on time today. We're going to recess until 9:30 tomorrow morning. During the overnight recess it remains critically important that you not talk to anyone about this case, that you not talk to members of your family about it. It remains critically important that you avoid any media exposure to any aspect. I thank you for your attention throughout the course of the day and particularly thank you for your attention to my instructions to you. At this time take a recess.

RECESS.

Friday, May 11, 1984. (9:30 A.M.)

COURT: Ladies and gentlemen, at this time I would ask that you again retire and continue your deliberations. Thank you very much.

JURY RETIRES.